

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUNN M. CABATINGAN and DEPARTMENT OF THE NAVY,
MILITARY SEALIFT COMMAND PACIFIC, Oakland, CA

*Docket No. 01-1642; Submitted on the Record;
Issued March 11, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that there was an overpayment of compensation in this case in the amount of \$4,037.38; and (2) whether appellant was at fault in the creation of the overpayment and therefore the overpayment was not subject to waiver.

On April 21, 1995 appellant, then a 59-year-old steward, sustained a back strain while in the performance of duty. Effective January 7, 1996 appellant was placed on the periodic compensation rolls to receive wage-loss compensation for temporary total disability.

By letter dated March 10, 1998, the Office advised appellant that he was not entitled to receive annuity payments from the Office of Personnel Management (OPM) and compensation from the Office for wage loss at the same time. Appellant was requested to make an election of benefits.

On March 10, 1998 appellant elected to receive OPM benefits rather than compensation from the Office with an effective date of October 11, 1997.

By letter dated August 10, 1999, the Office advised appellant of its preliminary determination that there was an overpayment of compensation in the amount of \$4,037.38 because he had elected to receive OPM benefits effective October 11, 1997 but continued to receive wage-loss compensation from the Office through June 19, 1999. The Office noted that OPM was recovering the compensation from ongoing annuity payments and refunding the Office but an overpayment remained for the period March 1, 1998 through June 19, 1999 amounting to \$4,037.38. The Office found that appellant was not without fault in the creation of the overpayment because he should have been aware, after going through the election of benefits process, that he could not receive OPM and Office compensation benefits at the same time and that he had therefore received incorrect compensation payments. Appellant was given 30 days in which to submit additional argument or evidence.

Appellant submitted an overpayment recovery questionnaire date August 30, 1999. He provided financial information and stated his reasons for believing that he was not at fault in the creation of the overpayment. Appellant also requested a telephone conference.

By letter dated February 3, 2001, the Office requested updated financial information from appellant and supporting documentation such as copies of bills. The Office also asked for clarification as to the amount of income that he was receiving from OPM.¹

By decision dated April 19, 2001, the Office found that there was a \$4,037.38 overpayment of compensation in appellant's case, that he was not without fault in the creation of the overpayment and therefore the overpayment was not subject to waiver. The Office noted that appellant had requested a telephone conference but, as he had failed to provide the current financial information requested on February 3, 2001, a conference would serve no purpose.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,037.38 for the period March 1, 1998 through June 19, 1999.

The record shows that the Office began paying appellant compensation for wage loss on January 7, 1996 for an April 21, 1995 employment injury. The Office subsequently found that appellant had received retirement benefits from the OPM for the period October 11, 1997 through June 19, 1999 while he was also receiving benefits under the Federal Employees' Compensation Act.²

With respect to the Act, section 8116(a) of the Act provides:

“While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay or remuneration of any type from the United States except --

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the department of Veterans Affairs unless such benefits are payable for the same injury or same death; and
- (4) retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services subject to

¹ On appeal, appellant stated that he sent additional information in February 2001 in response to the Office's February 3, 2001 letter. However, the case record does not contain any correspondence sent by appellant to the Office in February 2001.

² 5 U.S.C. §§ 8101-8193.

the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.

“However, eligibility for or receipt of benefits under subchapter III of Chapter 83 of this title, or another retirement system for employees of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”³

In this case, the evidence of record shows that appellant received disability compensation benefits from the Office at the same time that he was receiving retirement benefits from OPM, from October 11, 1997 through June 19, 1999. As appellant is not entitled to receive dual benefits covering the same time period the Office properly determined that an overpayment had occurred for that period.⁴

The Board further finds that the Office properly determined that appellant was with fault in the creation of the overpayment and therefore the overpayment was not subject to waiver.

Section 8129(a) of the Act⁵ provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.⁶ The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”⁷

Under section 10.433 of Title 20 of the Code of Federal Regulations, the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁸ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are

³ 5 U.S.C. § 8116(a).

⁴ As noted above, OPM began refunding the amount of compensation paid by the Office to appellant during the period October 11, 1997 through February 28, 1998 through appellant’s ongoing OPM benefits, leaving an overpayment for the period March 1, 1998 through June 19, 1999 in the amount of \$4,037.38.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.433.

proper.⁹ In determining whether an individual is at fault, section 10.433 provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”¹⁰

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. On January 7, 1996 appellant was placed on the periodic compensation rolls to receive compensation for temporary total disability. By letter dated March 10, 1998, the Office advised appellant that he was not entitled to receive annuity payments from OPM and compensation from the Office for wage loss at the same time. On March 10, 1998 appellant elected to receive OPM benefits rather than compensation from the Office with an effective date of October 11, 1997, but continued to receive wage-loss compensation payments from the Office through June 19, 1999. The Office’s March 10, 1998 letter put appellant on notice of the fact that he could not accept compensation payments from the Office during the same period that he received retirement benefits from OPM. The Board finds that the facts of this case establish that appellant knew or should have known that he was not entitled to receive compensation from the Office and from OPM from October 11, 1997 through June 19, 1999. Therefore, he was not without fault in the creation of the overpayment and the overpayment was not subject to waiver.

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.433(a).

The April 19, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 11, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member